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United States District Court
Eastern District of New York

1:20-cv-05125

Stephen Bradshaw, individually and on
behalf of all others similarly situated,

Plaintiff,

- against -

Blue Diamond Growers,

Defendant

Complaint

Plaintiff by attorneys alleges upon information and belief, except for allegations pertaining to plaintiff, which are based on personal knowledge:

1. Blue Diamond Growers (“defendant”) manufactures, distributes, markets, labels and sells blends of almond milk and coconut milk under the Almond Breeze brand purporting to be flavored only with vanilla (“Product”).

2. The Product is available to consumers from retail and online stores of third-parties and is sold in cartons of 32 OZ and 64 OZ.

3. The relevant front label representations include “Unsweetened,” “Vanilla,” “Almond Breeze,” “Almond Coconut Blend,” “almondmilk coconutmilk blend” and pictures of almonds and coconuts.¹

¹ The original complaint included a different version of the product label. The version included here is the label relied on by Plaintiffs.



4. The representation as “Vanilla” is false, deceptive and misleading because the Product contains fake, artificial vanilla which provides the vanilla taste, and the amount of real vanilla, if any, is trace or *de minimis*.

5. Vanilla (*Vanilla planifolia* Andrews and *Vanilla tahitensis* Moore) comes from an orchid plant that originated in Mexico where it was first cultivated.

6. The vanilla orchid produces a fruit pod, the vanilla bean, which is the raw material for true vanilla flavorings.

7. The vanilla bean is not consumed by itself – it is heated in the sun for weeks until being soaked in alcohol solution and its flavor constituents extracted (vanilla extract).

8. An example of the compounds which provide vanilla's flavor are shown below in a sample of vanilla extract.

MS Scan #	Area Integration	Peak Assignment	Peak Area %
67	16132	hexanal	0.0206
71	16235	butanediol isomer	0.0207
81	57370	butanediol isomer	0.0732
103	36387	3-methylbutyric acid	0.0464
115	33053	furfural	0.0422
141	27408	butanal, diethyl acetal	0.0350
262	18390	3-methylbutanal, diethyl acetal	0.0235
281	25224	hexanoic acid	0.0322
289	2729	methyl furfural	0.0035
299	52183	phenol + trace of benzaldehyde	0.0665
349	2385	1H-pyrrole-2-carboxaldehyde	0.0030
379	47287	limonene + benzyl alcohol	0.0603
397	13835	heptanoic acid	0.0176
409	31102	gamma-hexalactone	0.0397
415	19338	p-cresol	0.0247
425	4470	hexanal, diethyl acetal	0.0057
443	287479	guaiacol	0.3666
453	5947	nonanal	0.0076
477	10000	phenylethyl alcohol	0.0128
496	112067	?	0.1429
505	44668	benzoic acid + octanoic acid	0.0570
522	4551	diethyl succinate	0.0058
536	2461	ethyl benzoate	0.0031
544	11769	1,2-benzenediol	0.0150
555	145356	2-methoxy-4-methylphenol	0.1854
567	2537	methyl salicylate	0.0032
587	8552	hydroxy methyl furfural (HMF)	0.0109
594	5555	benzeneacetic acid	0.0071
605	101562	nonanoic acid	0.1295
624	6802	hydroquinone	0.0087
631	3864	4-methoxybenzaldehyde (p-anisaldehyde)	0.0049
642	6356	ethyl nonanoate	0.0081
653	53264	4-methoxybenzyl alcohol (p-anisyl alcohol)	0.0679
676	14481	cinnamyl alcohol	0.0185
685	16094	3-hydroxybenzyl alcohol	0.0205
718	12188570	3-hydroxybenzaldehyde + 4-ethoxymethylphenol	15.5440
751	122634	methyl cinnamate	0.1564
759	60715743	vanillin	77.4301
796	90669	methyl-p-methoxybenzoate (methyl paraben)	0.1156
809	2228588	vanillyl ethyl ether + trace of 4-hydroxy-3-methoxybenzyl alcohol	2.8421
832	224829	p-hydroxybenzoic acid	0.2867
839	37335	acetovanillone	0.0476
892	950342	vanillic acid	1.2120
908	405589	3,4-dihydroxybenzaldehyde	0.5172
935	82429	3,4-dihydroxy-5-methoxybenzaldehyde	0.1051
954	6212	ethyl homovanillate	0.0079
975	78148	syringaldehyde	0.0997
1266	14130	ethyl palmitate	0.0180
1518	21477	ethyl linoleate	0.0274
78413588 Total			100.0000

9. While the main flavor compound of vanilla is vanillin (MS Scan # 759, 77.4301 Peak Area %), vanilla's unique flavor is due to over 200 compounds scientists have identified, including volatile constituents such as acids, ethers, alcohols, acetals, heterocyclics, phenolics, hydrocarbons, esters and carbonyls.

10. Methyl cinnamate (MS Scan # 751) and p-cresol (MS Scan # 415) provide cinnamon and creamy flavor notes to vanilla.

11. Other compounds present in relatively significant amounts include acetovanillone, cinnamyl alcohol, guaiacol, p-cresol, p-hydroxybenzoic acid (MS Scan # 832, 0.2867), vanillic acid (MS Scan # 892, 1.2120) and vanillyl ethyl ether.

12. The popularity of vanilla in the 19th century led to the isolation of the vanillin molecule from vanilla, which became the first artificial flavor.

13. This availability of low-cost vanillin resulted in companies adulterating foods purporting to contain vanilla, by either including no vanilla or a trace or *de minimis* amount, boosted by added synthetic vanillin.

14. However, vanillin separated from the rest of the vanilla bean it lacked the other components of vanilla's flavor.

15. Consumer and industry groups have long sought to prevent this deception.

16. The earliest efforts to prevent fraud in vanilla products was the U.S. Pharmacopeia standard, which required a specific weight of vanilla beans as the source for vanilla extract.

17. The focus was on the weight of actual vanilla beans, because this would prevent companies from adding vanillin to a small amount of vanilla beans.

18. Consumer deception continued into the 20th century, with government entities regularly penalizing companies that deceived consumers by labeled their products and foods as

“vanilla” but were little more than vanillin with caramel coloring.

19. Congress took note of this consumer deception, and directed the Food and Drug Administration (“FDA”) to establish standards to prevent the marketing of foods from which traditional constituents were removed and new or different (often cheaper and artificial) ingredients were substituted.

20. Vanilla was one of these foods, and regulations were enacted which prevented vanillin from being added to vanilla without disclosing this fact to consumers.

21. For over fifty (50) years, companies’ adherence to labeling foods containing vanillin as artificially flavored gave consumers confidence to trust what was on a label.

22. When a food was labeled as “vanilla” without qualification, it was understood by consumers that the flavoring was only from the ingredient of vanilla beans.

23. These regulations effectively established custom and practice in the so that consumers’ experience has primed them to infer from a product’s labeling whether the flavor source is entirely from the characterizing vanilla bean ingredient or not.

24. In early 2018, in response to reports of a surge in fraudulent vanilla flavored foods, the flavor industry – The Flavor and Extract Manufacturers Association of the United States or “FEMA” – urged companies to return to truthfully labeling vanilla foods so consumers would not be misled by artificial vanilla flavors where foods were labeled only with “vanilla.” *See* John B. Hallagan and Joanna Drake, FEMA, “[Labeling Vanilla Flavorings and Vanilla-Flavored Foods in the U.S.](#),” *Perfumer & Flavorist*, Vol. 43 at p. 46, Apr. 25, 2018 (“Hallagan & Drake”).²

25. Based on the term “Vanilla” and the absence of any qualifying terms, reasonable

² Hallagan and Drake, “There are many current examples of food products that are labeled as ‘vanilla’ that are clearly mislabeled and therefore in violation of FDA regulations.” FEMA’s *cri de coeur* was not completely magnanimous. It presently enjoys a special relationship with the FDA whereby its committee is responsible for certifying new food ingredients are safe for consumption. If companies flout the regulations, FEMA’s status would be undermined.

consumers, and Plaintiffs, expect(ed) the Product's vanilla taste to be only from vanilla beans.

26. In a nationwide survey of over four hundred people of various educational, ethnic and socio-economic backgrounds, over sixty-six (66) percent understood the Product's "Vanilla" statement to mean the vanilla taste came from vanilla beans from the vanilla plant while twenty-eight (28) percent expected the vanilla taste was from non-vanilla sources.

27. Of the sample surveyed, approximately fifty-six (56) percent indicated they would be less likely to purchase the Product if they knew the vanilla taste came from artificial vanilla flavors.

28. Though the Product's front label only references "Vanilla," the ingredient list does not clarify and disclose to consumers that its vanilla taste comes predominantly from non-vanilla sources, since the flavoring is declared as "Natural Flavors."



Ingredients: Almondmilk (Filtered Water, Almonds), Coconutmilk (Filtered Water, Coconut Cream), Calcium Carbonate, Natural Flavors, Potassium Citrate, Sea Salt, Sunflower Lecithin, Gellan Gum, Vitamin A Palmitate, Vitamin D2, D-Alpha-Tocopherol (Natural Vitamin E).

INGREDIENTS: ALMONDMILK (FILTERED WATER, ALMONDS), COCONUTMILK (FILTERED WATER, COCONUT CREAM), CALCIUM CARBONATE, **NATURAL FLAVORS**, POTASSIUM CITRATE, SEA SALT, SUNFLOWER LECITHIN, GELLAN GUM, VITAMIN A PALMITATE, VITAMIN D2, D-ALPHA-TOCOPHEROL (NATURAL VITAMIN E).

29. That the "Natural Flavors" contains added vanillin is demonstrated through GC-MS analysis, a method of targeted and non-targeted detection which can identify the range of volatile compounds responsible for vanilla's flavor with minimal to no degradation.

30. The benefit of such an approach is the focus on signals generated and comparison with a known authentic sample.

MS Scan #	Area Integration	Peak Assignment	Conc. PPM w/w
100	54739	formic acid	0.014
138	155343	acetic acid	0.039
208	179712	acetol	0.045
215	19321	propanoic acid	0.005
253	110306	acetoin	0.028
281	301046	1,2-propylene glycol	0.076
313	14350	butyric acid	0.004
330	23498	1,3-butanediol	0.006
338	72387	hexanal	0.018
378	34688	methyl pyrazine	0.009
384	24576	furfural	0.006
414	66189	furfuryl alcohol	0.017
427	25818	pentanoic acid	0.007
470	12102	heptanal	0.003
492	80103	2,5-dimethylpyrazine	0.020
541	311750	hexanoic acid	0.079
549	16426	methyl furfural	0.004
558	140563	benzaldehyde	0.035
569	36299	6-methyl-5-hepten-2-one	0.009
578	15551	2-pentylfuran	0.004
592	23802	octanal	0.006
599	42217	trimethylpyrazine	0.011
605	12512	1H-pyrrole-2-carboxaldehyde	0.003
625	37005	cyclotene	0.009
637	42556	benzyl alcohol	0.011
657	96229	heptanoic acid	0.024
660	127596	2-acetyl pyrrole	0.032
675	148305	tetramethylpyrazine	0.037
695	39158	guaiacol	0.010
704	112417	nonanal	0.028
726	15725391	maltol	3.971
757	613569	octanoic acid + benzoic acid	0.155
809	62481	decanal	0.016
820	3960472	naphthalene-d8 (internal standard)	1.000
829	174273	hydroxymethyl furfural (HMF)	0.044
852	369429	nonanoic acid	0.093
869	271802	gamma-octalactone	0.069
893	42902	delta-octalactone	0.011
900	99937	2,4-decadienal	0.025
923	239566	2,4-decadienal	0.060
946	391210	decanoic acid	0.099
968	674802	gamma-nonolactone	0.170
986	43483	delta-nonolactone	0.011
1019	63016900	vanillin	15.911
1035	18427	geranyl acetone	0.005
1062	478409	gamma-decalactone	0.121
1082	10391	acetovanillone	0.003
1086	19537	delta-decalactone	0.005
1117	1805139	lauric acid	0.456
1145	35452	ethyl laurate	0.009
1276	79118	myristic acid	0.020
1434	91441	methyl palmitate	0.023
1467	302497	vanillin glyceryl acetal	0.076
1486	171521	vanillin glyceryl acetal	0.043
1499	194697	vanillin glyceryl acetal	0.049
1656	205663	methyl linoleate	0.052
1663	312939	methyl oleate	0.079
1695	29580	methyl stearate	0.007
87857120 Total (excluding internal standard)			22.183

31. The results show the Product contains an abnormal excess of vanillin (MS Scan # 1019, 15.911 PPM) relative to the profile of minor components in a vanilla preparation, which is a strong indicator it contains vanillin from non-vanilla sources.

32. When vanillin is present from vanilla beans, it will be accompanied by other compounds present in vanilla in small amounts, such as p-hydroxybenzoic acid and vanillic acid.

33. The above sample of vanilla extract reveals that the ratio of vanillin to p-hydroxybenzoic acid is 270 (vanillin, MS Scan # 759, 77.4301 divided by p-hydroxybenzoic acid, MS Scan # 832, 0.2867) and vanillin to vanillic acid is 64 (vanillin, MS Scan # 759, 77.4301 divided by vanillic acid, MS Scan # 892, 1.2120).

34. Assuming that all vanillin in the Product came from vanilla beans, it would be expected to contain p-hydroxybenzoic acid at 0.059 PPM and vanillic acid at 0.249 PPM, based on their relative amounts in the vanilla extract sample.

35. The failure to detect p-hydroxybenzoic acid and vanillic acid, despite these compounds being analyzed for, means that the Product contains a trace or *de minimis* real vanilla and added vanillin.

36. The representation of “vanilla” is misleading because consumers expect to be told the Product is flavored with vanillin through a label statement of “artificially flavored.”

37. Because the Product is characterized as “vanilla” and “contains vanillin derived from a non vanilla bean source,” it should be labeled as “artificially flavored.” FDA Letter, Margaret-Hanna Emerick, FDA, to Richard Brownell, February 25, 2016; *See* 21 C.F.R.101.22(i)(2).

38. By omitting “artificial flavor” or “artificially flavored” from the front label, consumers are not told that the Product’s taste is from artificial vanilla flavors.

39. Consumers who read the ingredient list will expect that the “Natural Flavors” are

other natural vanilla flavors instead of artificial vanilla flavors and are misled to believe that the Product contains more vanilla than it does.

40. Consumers are entitled to know “whether the product [they are buying] is flavored with a vanilla flavoring derived from vanilla beans, in whole or in part, or whether the food’s vanilla flavor is provided by flavorings not derived from vanilla beans.”³

41. Plaintiff reasonably believed that the “vanilla” representation on the front label of the Product meant that the Product was flavored only from the characterizing ingredient of vanilla beans and did not contain added vanillin, because this information is required to be disclosed, *viz*, by stating “artificially flavored.”

42. Defendant knows consumers will pay more for the Product because the front label only states “vanilla” and not “artificially flavored.”

43. Defendant’s omission and failure to disclose artificial vanilla flavor on the front label is deceptive and misleading to consumers.

44. Defendant’s branding and packaging of the Product is designed to – and does – deceive, mislead, and defraud plaintiff and consumers.

45. Defendant sold more of the Product and at higher prices than it would have in the absence of this misconduct, resulting in additional profits at the expense of consumers.

46. The value of the Product that plaintiff purchased and consumed was materially less than its value as represented by defendant.

47. Had plaintiff and class members known the truth, they would not have bought the Product or would have paid less for them.

48. As a result of the false and misleading labeling, the Product is an sold at a premium

³ Id.

price, approximately no less than \$3.59 per 32 OZ, excluding tax, compared to other similar products represented in a non-misleading way, and higher than the price of the Product if it were represented in a non-misleading way.

Jurisdiction and Venue

49. Jurisdiction is proper pursuant to Class Action Fairness Act of 2005 (“CAFA”). 28 U.S.C. § 1332(d)(2)

50. Under CAFA, district courts have “original federal jurisdiction over class actions involving (1) an aggregate amount in controversy of at least \$5,000,000; and (2) minimal diversity[.]” *Gold v. New York Life Ins. Co.*, 730 F.3d 137, 141 (2d Cir. 2013).

51. Plaintiff Stephen Bradshaw is a citizen of New York.

52. Defendant Blue Diamond Growers, is a California corporation with a principal place of business in Sacramento, Sacramento County, California and is a citizen of California.

53. “Minimal diversity” exists because plaintiff Stephen Bradshaw and defendant are citizens of different states.

54. Upon information and belief, sales of the Product in New York exceed \$5 million per year, exclusive of interest and costs, and the aggregate amount in controversy exceeds \$5 million per year.

55. Venue is proper in this judicial district because a substantial part of the events or omissions giving rise to the claim occurred in this District, viz, the decision of plaintiff to purchase the Product and the misleading representations and/or their recognition as such.

56. This court has personal jurisdiction over defendant because it conducts and transacts business, contracts to supply and supplies goods within New York.

Parties

57. Plaintiff Stephen Bradshaw is a citizen of New York, Staten Island, Richmond County.

58. Defendant Blue Diamond Growers is a California corporation with a principal place of business in Sacramento, California, Sacramento County and is a citizen of California.

59. During the relevant statutes of limitations for each cause of action alleged, plaintiff purchased the Product within his district and/or State for personal and household consumption and/or use in reliance on the representations of the Product.

60. Plaintiff Stephen Bradshaw purchased the Product on numerous occasions during 2019, including several times during the spring and summer of 2019, at stores including ShopRite, 985 Richmond Ave, Staten Island, NY 10314.

61. Plaintiff bought the Product at or exceeding the above-referenced price because he liked the product for its intended use and relied upon the front label claims, expected the vanilla taste to come exclusively and/or predominantly from vanilla beans and did not expect its vanilla taste to be provided by artificial vanilla flavors.

62. Plaintiff was deceived by and relied upon the Product's deceptive labeling.

63. Plaintiff would not have purchased the Product in the absence of Defendant's misrepresentations and omissions.

64. The Product was worth less than what Plaintiff paid for it and he would not have paid as much absent Defendant's false and misleading statements and omissions.

65. Plaintiff intends to, seeks to, and will purchase the Product again when he can do so with the assurance that Product's labels are consistent with the Product's components.

Class Allegations

66. The class will consist of all purchasers of the Product who reside in New York during the applicable statutes of limitations.

67. Plaintiff seek class-wide injunctive relief based on Rule 23(b) in addition to a monetary relief class.

68. Common questions of law or fact predominate and include whether defendant's representations were and are misleading and if plaintiff and class members are entitled to damages.

69. Plaintiff's claims and basis for relief are typical to other members because all were subjected to the same unfair and deceptive representations and actions.

70. Plaintiff is an adequate representatives because his interests do not conflict with other members.

71. No individual inquiry is necessary since the focus is only on defendant's practices and the class is definable and ascertainable.

72. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

73. Plaintiff's counsel is competent and experienced in complex class action litigation and intends to protect class members' interests adequately and fairly.

74. Plaintiff seeks class-wide injunctive relief because the practices continue.

New York General Business Law ("GBL") §§ 349 & 350
(Consumer Protection Statute)

75. Plaintiff incorporates by reference all preceding paragraphs.

76. Plaintiff and class members desired to purchase and consume products which were as described and marketed by defendant and expected by reasonable consumers, given the product type.

77. Defendant's acts and omissions are not unique to the parties and have a broader impact on the public.

78. Defendant misrepresented the substantive, quantitative, qualitative, compositional and/or organoleptic attributes of the Product.

79. The amount and proportion of the characterizing component, vanilla, has a material bearing on price and consumer acceptance of the Product and consumers do not expect artificial vanilla because it was not stated on the front label or ingredient list, where consumers are accustomed to looking and seeing this information.

80. Plaintiff relied on the statements, omissions and representations of defendant, and defendant knew or should have known the falsity of same.

81. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Negligent Misrepresentation

82. Plaintiff incorporates by reference all preceding paragraphs.

83. Defendant misrepresented the substantive, quantitative, qualitative, compositional and/or organoleptic attributes of the Product.

84. The amount and proportion of the characterizing component, vanilla, has a material bearing on price and consumer acceptance of the Product and consumers do not expect artificial vanilla because it was not stated on the front label or ingredient list, where consumers are accustomed to looking and seeing this information.

85. Defendant had a duty to disclose the non-vanilla, artificial flavors and/or provide non-deceptive marketing of the Product and knew or should have known same were false or misleading.

86. This duty is based on defendant's position as an entity which has held itself out as having special knowledge and experience in the production, service and/or sale of the product type.

87. The representations took advantage of consumers' cognitive shortcuts made at the point-of-sale and their trust in defendant, a well-known and respected brand or entity in this sector.

88. Plaintiff and class members reasonably and justifiably relied on these negligent misrepresentations and omissions, which served to induce and did induce, the purchase of the Product.

89. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Breaches of Express Warranty, Implied Warranty of Merchantability and
Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*

90. Plaintiff incorporates by reference all preceding paragraphs.

91. The Product was manufactured, labeled and sold by defendant or at its express directions and instructions, and warranted to plaintiff and class members that they possessed substantive, quality, organoleptic, and/or compositional attributes it did not.

92. Defendant had a duty to disclose and/or provide non-deceptive descriptions and marketing of the Product.

93. The amount and proportion of the characterizing component, vanilla, has a material bearing on price and consumer acceptance of the Product and consumers do not expect artificial vanilla because it was not stated on the front label or ingredient list, where consumers are accustomed to looking and seeing this information.

94. This duty is based, in part, on defendant's position as one of the most recognized companies in the nation in this sector.

95. Plaintiff provided or will provide notice to defendant, its agents, representatives,

retailers and their employees.

96. Defendant received notice and should have been aware of these misrepresentations due to numerous complaints by consumers to its main office over the past several years regarding the Product, of the type described here.

97. The Product did not conform to its affirmations of fact and promises due to defendant's actions and were not merchantable.

98. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Fraud

99. Plaintiff incorporates by reference all preceding paragraphs.

100. Defendant misrepresented the substantive, quality, compositional and/or organoleptic attributes of the Product.

101. The amount and proportion of the characterizing component, vanilla, has a material bearing on price and consumer acceptance of the Product and consumers do not expect artificial vanilla because it was not stated on the front label or ingredient list, where consumers are accustomed to looking and seeing this information.

102. Defendant's fraudulent intent is evinced by its failure to accurately identify the Product on the front label and ingredient list, when it knew its statements were neither true nor accurate and misled consumers.

103. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Unjust Enrichment

104. Plaintiff incorporates by reference all preceding paragraphs.

105. Defendant obtained benefits and monies because the Product was not as represented and expected, to the detriment and impoverishment of plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits.

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, Plaintiff prays for judgment:

1. Declaring this a proper class action, certifying plaintiff as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant to correct the challenged practices to comply with the law;
3. Injunctive relief to remove, correct and/or refrain from the challenged practices and representations, and restitution and disgorgement for members of the class pursuant to the applicable laws;
4. Awarding monetary damages and interest pursuant to the common law and other statutory claims;
5. Awarding costs and expenses, including reasonable fees for plaintiff's attorneys and experts; and
6. Other and further relief as the Court deems just and proper.

Dated: October 25, 2020

Respectfully submitted,

Sheehan & Associates, P.C.

/s/Spencer Sheehan

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Stephen Bradshaw, individually and on behalf of all others similarly situated,

Plaintiff,

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Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information, and belief, formed after an inquiry reasonable under the circumstances, the contentions contained in the annexed documents are not frivolous.

Dated: October 25, 2020

/s/ Spencer Sheehan
Spencer Sheehan